No. 5500

United States Circuit Court of Appeals

For the Ninth Circuit

GEORGE P. CLARK, Trustee in Bankruptcy of the Estate of EDNA G. MILENS,

Appellant,

vs.

EDNA G. MILENS,

Appellee.

Brief of Appellee

Upon Appeal from the United States District Court for the District of Oregon.

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STATEMENT OF THE CASE

In the Transcript of Record herein, prepared and filed by appellant, there are set out copies of Record involved, in part, in this cause, to-wit:

"Answer of Bankrupt to Rule to Show Cause Why Edna G. Milens Should Not Be Punished for Contempt for Failure to Obey Order ..... (Trans. 9)

Assignment of Error..... (Trans. 24)

Citation on Appeal.... ..... (Trans. 20)

Findings of Referee..... (Trans. 9)

Opinion (Oral)..... (Trans. 14)

Order Allowing Appeal Without Bond.... .....(Trans. 26)

Order Purging of Contempt.....(Trans. 18)

Order Requiring Edna G. Milens to Turn Over to Her Trustee Assets Unaccounted for to Such Trustee .....(Trans. 3)

Petition for Order Allowing Appeal from An Order Made By the District Court of the United States for the District of Oregon Purging Edna G. Milens of Contempt.. .....(Trans. 22)

Referee's Certificate re Alleged Contempt.. .....(Trans. 1)

Rule to Show Cause re Contempt..(Trans. 7)

Hence, Appellee does not deem it of any good purpose to again re-write such Records verbatim herein.

Appellant, in his brief, predicates his appeal in this cause upon an alleged error of the Honorable District Judge, Robert S. Bean, in dismissing contempt proceedings instituted against the bankrupt herein, Edna G. Milens, and purging her of contempt.

Under the head of "Specifications of Errors," as shown on page six (6) of Appellant's Brief, it is claimed in substance as error on the part of the trial court:

THE FIRST ERROR ALLEGED is the failure of the District Court of the United States for the District of Oregon to accept and adopt the findings and order of the Referee based thereon requiring the bankrupt to turn over to her trustee, money in

her possession wilfully and unlawfully concealed by her from her trustee in bankruptcy from which findings and order of the Referree, no review or appeal was taken by the bankrupt and which, as a consequence thereof, became a final judgment.

THE SECOND ERROR ALLEGED is the making of the order by the District Court of the United States for the District of Oregon purging the bankrupt of contempt for her refusal to obey a final order requiring her to pay to her trustee in bankruptcy, the sum of $5,377.37, found to be in her possession and wilfully and fraudulently withheld from her trustee, although the bankrupt offered no testimony, made no showing and called no witnesses in the contempt proceeding.

In discussing these alleged errors, it seems proper to consider them under the head of "Argument," as there is really, as appellee views it, but one question involved, and that is, the right of the District Judge, the Honorable Robert S. Bean, to consider said cause generally. It is contended by appellant's counsel that the only question that the District Court could consider and pass upon was, "What had the defendant, bankrupt, done with the money that she had been declared by the Referee to have in her possssion since the time the order making that Finding was signd?" In other words, appellant contends the trial judge could not consider the Findings of the Referee with other records of the case as to the questions of fact, but

that Findings are to be held to be conclusive and limit the inquiry to the acts of the bankrupt (appellee) subsequent to said Findings.

Under such theory, it is contended by counsel for appellant:

(1) That as a matter of course, under the Bankrupt Law and proceedure, Bankrupt was guilty of contempt of Court.

Considering carefully the opinion of the trial judge, the Honorable Robert S. Bean, on the question of Appellee's alleged contempt, as set forth in the Transcript of Record (Trans., p. 14) and weighing the logic and reason naturally inherent therein, it appears to counsel for appellee to be in itself conclusive and complete, answering all the argument of appellant and harmonizing with the law and the weight of decisions in proceedings of this nature.

A careful analysis of the entire record, as shown in the Transcript, including the Referee's Report, will disclose, we submit, inherent defects in the Findings, rendering such insufficient to warrant sustaining a contempt proceeding upon the grounds claimed by appellant.

The Findings are indefinite and uncertain:

(1) As to the specific sum of money in the hands of the bankrupt at the time the order of the Referee was made.

(2) As to whether this money which came into the hands of the appellee during the period of

bankruptcy prior to the making of the order was the specific fund that belonged to the bankrupt estate.

(3) As to whether any funds were in the physical possession of the bankrupt at the time the order was made.

(4) As to whether she wilfully and fraudulently refused to pay the same over to the Trustee.

The trial Court, in a bankruptcy proceeding, is clothed with a discretion THAT COURTS HAVE A RIGHT TO EXERCISE IN USING THEIR EXTRAORDINARY POWER IN CONTEMPT PROCEEDINGS, WHICH MUST BE A FREE AND BROAD DISCRETION. It cannot, in the nature of things, be hampered and restrained and restricted by the decisions of other Courts to any very great extent. It is not regulated by statute. It is a power inherent in the Courts to be exercised by the particular judge who may feel that this power is necessary in the particular case and must be exercised in each case as the then presiding Judge in such Court and cause views the facts to the end that the dignity and efficiency of the Court in any particular action should be upheld.

It must necessarily be, to a very large extent, a matter of discretion with the trial judge before whom the matter is heard, and it must so clearly appear to such particular Court then considering the instant records and facts that this extraordi-

nary power should be exercised, and the Court must be satisfied of the facts set forth by the record, including the Referee's Findings, that the same are applicable to the particular case, and, that there is no reasonable doubt as to the matters of alleged contempt charged, viz:

(1) That the bankrupt or appellee had in her possession at the time an order was made, the particular and specific sum of money, and

(2) Had the physical ability to turn the same over to the Trustee, and

(3) Wilfully and fraudulently refused to do so.

Naturally, we submit, appellant Courts will hesitate to pass upon and reverse the decision of a trial Court in a matter of contempt proceeding which the trial Court, in exercising its inherent right and conscience and discretion alone has found the record insufficient to call forth an exercise of such extraordinary power.

Will the appellant Court, in a contempt proceeding, as the instant case, in a proceeding that lies solely within the consideration of the trial Court, solely within the conscience of the Court, exercised by the Court for the purpose of maintaining the dignity and efficiency of this particular Court, find this appellee guilty of contempt on a showing of such a character as the record herein discloses without giving her the benefit of the fact that REASONABLE DOUBT DID OR COULD ARISE herein in its exercise of this ex-

traordinary power to meet the ends of justice? We believe not. We believe it appears from the record in said cause that no such a clear case is made out by the appellant as would warrant this Court to reverse the order of the District Court made and entered herein.

We submit that unless the appellee in bankruptcy in a contempt proceeding instituted against her:

(1) Has a specific fund or specific property in her possession, and

(2) Can turn the same over to the Trustee for the benefit of the bankrupt estate,

. . . the contempt proceeding can avail nothing to the creditors of the estate. Appellee submits that a charge of contempt is, in all such cases, a vindictive and near punitive proceeding and should be denied in all cases where the trial Court in contempt proceedings is convinced that punishment for contempt, as asked for by appellant herein, IS AN APPARENT ATTEMPT TO COLLECT FROM APPELLEE A DEBT FOR THE CREDITORS.

Appellee submits that the Court will seldom exercise this extraordinary power to punish for dereliction of duty, nor to compel the doing of an act by a person which act is beyond such person's physical ability, but will generally leave such cases to other departments of civil or criminal law where the defendant may have the right of trial by jury, and, as it appears from the record, as was

found in this case by the Honorable Robert S. Bean, District Judge, that it appears from the Findings of Fact as shown by the Referee's Report THAT THIS CLAIM CAN BE NO MORE THAN A DEBT; HENCE, CONTEMPT PROCEEDINGS WILL NOT BE SUSTAINED, FOR IN THIS COUNTRY, THE TIME HAS LONG PASSED WHEN A DEBTOR MAY BE PUNISHED CRIMINALLY FOR THE FAILURE TO PAY A DEBT, and the contempt proceeding asked against said appellee, as charged by appellant herein, would, in the nature of things, be a means of depriving said appellee of her right of trial by jury.

AUTHORITIES

It is generally conceded in view of constitutional or statutory provisions forbidding imprisonment for debt, that Courts have held that disobedience to an order to pay money pursuant to a judgment or decree or an order in the nature of a judgment or decree, cannot be punished as a contempt.

Nelson vs. Hill, 89 Fed. 477.
Mallory Mfg. Co. vs. Fox, 20 Fed. 409.

Contempt will not lie for failure to comply with an uncertain or indefinite order. In order to be valid and binding, the order must be certain or definite in its terms. A charge of contempt cannot be established for failure to comply with

uncertain or indefinite orders, judgments, or mandates.

Privett vs. Pressley, 62 Ind. 491.

Riclay vs. Whitcher, 18 Ind. 458.

Moore vs. Smith, 72 N. Y. App. Div. 614; 74 N. Y. Suppl. 1089.

Refusal to deliver property to a receiver, where the property is not properly designated, is not contempt.

Casselar vs. Simons, 8th ~~page~~ Paige (~~N. W.~~ N. Y. 273).

Where it appears or was impossible to comply with an order without fault on the part of the one charged, there is no contempt.

Ex. P. Overend, 122 California, 201; 54 Pac. 740.

Walton vs. Walton, 54 N. J. Eq. 607; 35 Atl. 289.

In the Matter of Ockhershausen, 59, Hun, 200, 13 N. Y. Suppl. 396.

Disavowal of any intention to commit a contempt may, however, extentuate, or even purge a contempt.

In re Perkins, 100 Fed. 950.

Vose vs. Internal Imp. Fund, 28 Fed. Cas. No. 17,008.

The appellant in this case, we submit, is wholly wrong in his theory of his right to have appellee adjudged in contempt. An applicant is not entitled as a matter of right to an order for the commitment of a person for contempt.

People vs. Durant, 116 Cal. 179; 48 Pac. 75.

The application is addressed to the discretion of the Court.

Ex. P. Beebees, 3 Fed. Cas. No. 1220.

Joyce vs. Holbrook, 2 Hilt (N. Y.) 94; 7 Abb. Pr. (N. Y.) 338.

Where the matters of contempt as charged have been finally adjudicated and the defendant discharged, or where the former punishment inflicted was un-authorized, he cannot be again tried with the same offense.

Eaton Rapid vs. Horner, 126 Mich. 52; 85 N. W. 264.

Appellee contends that in this light, the appellant, in attempting to perfect an appeal in this case, is, in substance, attempting to have appellee tried twice on the matter of contempt and is endeavoring to have the matter of contempt brought before and determined upon again by this Court, when as a matter of fact, Appellee contends the matter of the alleged contempt originally, solely and finally rest within the jurisdiction of the Dis-

trict Court alone, presided over in the instant case by Judge Robert S. Bean, and appellee submits that the order and opinion by Judge Robert S. Bean, in the following words and figures, to-wit:

"(Title of Court and Cause.)

OPINION (ORAL).

Portland, Oregon, April 23, 1928.

R. S. BEAN, District Judge.—In this matter, Mrs. Milens was adjudged a bankrupt on the 3d of December, 1926. On the 21st of January of the following year, on the hearing of a petition of the Trustee for an order requiring her to turn over to him certain property, the Referee found that during the year 1926 the bankrupt had received in cash from the sale of merchandise between $17,000 and $18,000, and had paid out for expenses and purchases, money and checks, the sum of $13,000, leaving a balance of about $5,000.00, which the Referee found that the bankrupt, although given an opportunity, had failed to account for, and that she had that in her possession at the time of the adjudication and at the time of the order. He thereupon entered an order requiring her to pay over this amount of money to the Trustee within a given time, and the order was served upon the bankrupt, and upon her failure to comply with it, the facts were certified to the Court, and an order made requiring her to appear and show cause why she should not be punished for contempt. For answer to the show-cause order, the bankrupt says that she did not at the time the order was made by the Referee and does not now have possession of the money or any part thereof, and is therefore unable to comply with the order.

Now there is a decided conflict in the authorities as to how far, if at all, the Court, in a proceeding for contempt for failure to comply with the terms of the order, may go behind the findings of the Referee and examine into the merits of the case, one line of authorities holding that the Referee's findings are conclusive, and that the only question for the Court in a contempt (17) proceeding for failure to comply therewith, is to inquire what the bankrupt has done with the property since the order of the Referee, and whether she had present ability to comply with it. Another line holds that in a contempt proceeding, the Court may go back of the order of the Referee and examine the facts. The practice seems to have been considered more fully by the Circuit Court of Appeals of the Third Circuit than elsewhere, and the rule there is that in a contempt proceeding, there are two steps: first, the finding of the Referee that the bankrupt had possession of the property which he was ordered to turn over, and that such order is final unless reviewed, and, second, a proceeding for contempt, in which the only question is whether the bankrupt is then physically able to comply with the order previously made. *But whatever the true rule may be, the Court may, of course, examine the finds and order of the referee to determine whether or not it warrants the extraordinary power of punishing* as for a contempt. The findings of the Referee are not *that the bankrupt had in her possession any specific money or property belonging to the estate*, which she was ordered to turn over to the trustee, but rather that she had received a certain sum of money during a given period, and was able to account for only a part thereof to the satisfaction of the Referee, and there-

fore, that she must have the balance in her possession. These findings would probably be sufficient to justify, in a proper proceeding, a judgment against the allaged bankrupt for the balance, but are they sufficient to justify her punishment by imprisonment for contempt? I think not. The Bankrupt Act requires the Referee to certify the facts to the Court, *and the Court to examine into the matter, and if, in its judgment, the evidence is sufficient to proceed as for a contempt, but this statute does not invest the court of bankruptcy with superior powers to punish for contempt than is vested in the courts generally.* What is legally sufficient to purge a contempt in other courts is sufficient in a like contempt in the bankruptcy court. The bankruptcy court may (18) punish for contempt for failure to comply with a turnover order, provided the bankrupt has the property in his possession or under his control. The power to punish for contempt is an extraordinary power and should be carefully exercised and only when its propriety is beyond reasonable doubt. It should appear that there has been a wilful disobedience of the order, and that the party complained of has acted in bad faith for the purpose of evading the order. The law makes ample provision for the punishment of the bankrupt for fraudulently concealing his property or false swearing, and there is therefore no reason for a Court to imprison a bankrupt for the purpose of compelling him to turn over property in doubtful cases. It should not be used and cannot be used for the purpose of enforcing the payment of a debt. Before resort should be had to this proceeding, it should clearly appear that the bankrupt actually had in his physical possession or under his control some specific money or property belong-

ing to the estate, which he was ordered to turn over to the trustee, and which he wilfully refused to do. One Judge has said that the property should be specifically identified to enable the marshal to take it into his possession. It is not enough, as I understand, that through some process of reasoning the bankrupt may be held liable. The effect of the findings and order of the referee in this case is that the bankrupt has not accounted for all the money received by her, and is therefore liable to the estate for the difference. To imprison her on that account would be to imprison her for a debt which is, of course, unthinkable.

So I take it that under this record an order discharging the bankrupt should be made.

Filed June 15, 1928, as of April 23, 1928.(19)

"(Title of Court and Cause.)

ORDER PURGING OF CONTEMPT

Said cause having come on for hearing before the above-entitled court on Monday, the 16th day of March, 1928, upon rule to show cause why Edna G. Milens should not be punished for contempt for failure to obey lawful order, said Edna G. Milens appearing in person and by her counsel, James H. McMenamin, and the trustee in bankruptcy herein being represented by Coan & Rosenberg, attorneys at law, and the Court having heard the argument of the respective parties, and having taken said matter under consideration, and being fully advised in the premises, does now

ORDER, That said contempt proceedings against said Edna G. Milens be, and the same

are hereby dismissed and she is purged of contempt in said cause.

(Signed) R. S. BEAN, *Judge.*

Filed April 28, 1928. (21)

discharging this contempt matter against Appellee, is final and conclusive, and is in the nature of an acquittal in a criminal cause and that no appeal lies therefrom.

Contempt proceedings against a party to punish him for a contempt of the authority and dignity of the court are considered to be in the nature of criminal proceedings.

New Orleans vs. New York Mail Steamship Co., 20 Wall. 387; 22 L. Ed. 354.

Accumulator Co. vs. Consolidation Electric Storage Co., 53 Fed. 796.

Goodrich vs. U. S., 42 Fed. 392.

Kirk vs. Milwaukee Dust Collector Mfg. Co., 26 Fed. 501.

In the present case, appellant predicates the proceeding for contempt wholly upon the Finding of the Referee, which Appellee submits were not the result of any conflict of testimony and which Appellee contends are wholly without facts to sustain same in the record. It does not appear that any witnesses appeared before said Referee to testify that said Appellee had assets she would not turn over to the Trustee. Appellee's testimony in said cause is indisputed on the point that she did not have any funds or moneys. The District Court

in passing upon the Record herein, including the Findings of Referee, is in no sense bound by the Referee's Finding, because the District Judge, having the facts before him, could make, and did make, the deductions for himself and those deductions announced in the opinion of Judge Bean, Appellee contends must necessarily stand as the decision of that particular District Court and as the ultimate pronouncement and final determination on the matter of the alleged contempt.

> "Ordinarily, the review by the judge of an order made by the Referee will be confined to the errors pointed out in the petition for review, but the judge may proceed to consider any point presented by the record then before him, whether such point was or was not discussed before or by the Referee:
>
> Vol. 1, Loveland Bankruptcy, pp. 225-6.
>
> *In re Samuel Wilde's Sons* (C. C. A. 2nd Cir.), 114 Fed. Rep. 972; 75 C. C. A., 601, 16 Am. B. R. 386.
>
> *In re Gottardi,* 114 Fed. Rep. 328; 7 Am. B. R. 723."

> "The judge reviews both law and fact. No fixed rule can be laid down with reference to the weight to be given by the judge to the finding of fact by the Referee in making his ruling or order. Much depends upon the character of the finding. As observed by Judge Lurton, 'IF IT BE A DEDUCTION FROM ESTABLISHED FACT, THE FINDING WOULD NOT CARRY ANY GREAT WEIGHT, FOR

THE JUDGE, HAVING THE SAME FACTS, MAY AS WELL DRAW INFERENCES OR REDUCE A CONCLUSION AS THE REFEREE.'

"Vol. 1, Loveland Bankruptcy, pp. 225-6.

In re Samuel Wilde's Sons (C. C. A. 2nd Cir.), 114 Fed. Rep. 972, 75 C. C. A. 601, R. B. 723."

In re Gottardi, 114 Fed. Rep. 328, 7 Am. B. R. 723.

We also call the Court's attention to Chapter Two (2) of the Bankruptcy Act of 1898, wherein powers and jurisdiction of District Courts in Bankruptcy are defined, sub-division ten (10) thereof, being as follows:

(10) TO CONFIRM, Etc., REFEREE'S FINDINGS. *Consider and confirm, modify or over-rule, or return, with instructions for further proceedings, records and findings certified to them by referees.*

. . . and also, the last paragraph of said Chapter Two (2), giving District Courts additional powers, the language of which is entitled "Unspecified Powers," empower a District Court, sitting in Bankrupt matters with additional authority, the language therein being:

"Nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated."

Vol. 1, Loveland on Bankruptcy.

ARGUMENT

The appellant herein has cited in his brief 42 cases. We submit to the court that the cases cited and the ruling therein made are clearly and completely distinguishable from the case at bar, and that no ruling announced by any of said cases submitted by appellant over-rules, modifies or qualifies the opinion rendered and decision made and handed down by Judge Robert S. Bean in the instant case (see opinion, Tran., p. 14 and Order, Tran., p. 18). We do not believe that a further or extended discussion on this point pertaining to cases cited by appellant would be of any assistance to the Court, as the Court will readily appreciate, we believe, what we have herein last said, upon investigating the decisions noted in appellant's brief.

Appellee raises the point herein THAT SAID APPELLANT IS WITHOUT WARRANT OR AUTHORITY IN LAW TO PREDICATE OR PROSECUTE AN APPEAL FROM THE ORDER OF Judge Robert S. Bean upon facts and record as in this instant case and we ask the Court to distinctly pass upon this point.

At common law, the exercise by a Court of competent jurisdiction of the power to punish for contempt cannot be reviewed. Every court is the exclusive judge of a contempt committed in its presence or against its process.

Hayes vs. Fischer, 102 U. S. 121, 26 L. Ed. 95.

New Orleans vs. New York Mail Steamship Co., 20 Wall. 387, 22 L. Ed. 354.

McMicken vs. Perin, 20 How. 133, 15 L. Ed. 857.

Sessions vs. Gould, 63 Fed. 1001, 11 C. C. A. 550.

King vs. Wooten, 54 Fed. 612, 4 C. C. A. 519.

In re Mason, 43 Fed. 510.

In the absence of statutory regulations, the matter of dealing with contempt and when and how they shall be punished are within the sound discretion of the trial Court, and unless such discretion is grossly abused, the decision must stand.

Clark vs. People, 12 Am. Dec. 177.

Brown vs. Brown, 58 Am. Dec. 641.

Murray vs. Berry, 18 S. E. 78.

Bagley vs. Scudder, 33 N. W. 47.

CONCLUSION

We conclude herein by calling the Court's attention particularly to the language of the Supreme Court of Oregon, in *Re Newhouse vs. Newhouse,* 14 Ore., pp. 292-93, wherein the Court said, among other things:

> "Mistake, misfortune, inability from poverty, or other equivalent cause, when shown to exist, have always been held in equity a sufficient excuse for non-payment of money, or failure to comply with an order, and to purge the con-

tempt. To the prayer originating in such cause, equity will lend a listening ear, and grant such relief as the merits of the facts authorize."

Appellee submits that the appeal of appellant herein should be dismissed with prejudice upon the record.

Respectfully submitted,

JAMES M. MCMENAMIN,
THOS. T. CLEETON,
Attorneys for Appellee.

STATE OF OREGON, }
County of Multnomah } ss.

I hereby certify that the foregoing is a true and correct copy of the original thereof.

James H. McMenamin
Of counsel for Appellee.